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Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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No. 85-1449

In the Supreme Court of the United States

OCTOBER TERM, 1985

TOWN OF NEWTON, ETC., ET AL.,
PETITIONERS,

v.

BERNARD E. RUMERY, JR.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONERS

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PETITION FOR CERTIORARI FILED FEBRUARY 28, 1986
CERTIORARI GRANTED APRIL 21, 1986

ASPP

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QUESTIONS PRESENTED FOR REVIEW

1. Does the mere possibility of prosecutorial abuse require a *per se* prohibition of all release-dismissal agreements on federal public policy grounds, regardless of the facts or circumstances of the case?

2. Are covenants not to sue police officers or public officials for alleged deprivation of civil or constitutional rights, offered in return for a prosecutor's agreement to drop pending criminal charges, valid and enforceable if given voluntarily and deliberately by an informed criminal defendant?

LIST OF ALL PARTIES

TOWN OF NEWTON (NEW HAMPSHIRE),
a municipal corporation;

DAVID T. BARRETT,
individually and as Chief of Police
for the Town of Newton;

KENNETH L. BOWERS, WILLIAM J. COOK and
MARY ALLEN, individually and in their official
capacities as Selectmen for the Town of Newton;
PETITIONERS,

v.

BERNARD E. RUMERY, JR.,
RESPONDENT.

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BRIEF FOR THE PETITIONERS

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit (Petition, App. A) is reported at 778 F.2d 66. The opinion of the United States District Court for the District of New Hampshire (Petition, App. B) is not officially reported.

Jurisdiction

The judgment of the Court of Appeals (Petition, App. C) was entered on December 2, 1985. The petition for a writ of certiorari was docketed on February 28, 1986. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

Relevant constitutional and statutory provisions include the First and Fourteenth Amendments to the Constitution of the United States (Petition, App. D-1), 42 U.S.C. § 1983 and New Hampshire RSA 641:5, I(b) (Petition, App. D-2).

Statement of the Case

Introduction

At issue in this case is the validity of a criminal defendant's post-arrest, pre-conviction waiver of his rights to a civil action pursuant to 42 U.S.C. § 1983, where the waiver has been found by a U.S. District Court Judge to be voluntary, deliberate and informed, executed with advice of competent counsel, in the absence of coercion, duress or improper motive.

Background

Bernard E. Rumery, a middle-aged insurance company marketing representive, was arrested on a warrant at his home on May 12, 1983, for tampering with a witness in violation of New Hampshire RSA 641:5,I(b), a class B felony.[1] His arrest resulted from telephone conversations with Mary Deary of Newton, New Hampshire, a widowed social and business acquaintance of Rumery, who was the victim and principal witness in a then ongoing case of aggravated felonious sexual assault. Her alleged rapist, David Champy, was a deer hunting companion of Rumery. Rumery said that after reading in a

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[1] "A person is guilty of a class B felony if

I. believing that an official proceeding . . . or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to . . .

(b) withhold any testimony, information, document or thing, . . ."

N.H. RSA 641:5,I(b).

local newspaper that Champy had been indicted, he coincidently chose Mary Deary, who also knew Champy, to call to find out who the victim had been. (J.A. 36) Mrs. Deary reported this telephone call to the Newton police on or about March 12, 1983. She felt that the call had been an attempt by Rumery to force her to drop the charges against Champy and to stop cooperating with the police.[2]

On May 11, 1983, while the criminal charges against Champy were still pending, Rumery and Mary Deary had a second telephone conversation which precipitated his arrest the following day. What Rumery actually said to Mrs. Deary in this second conversation was not adjudicated below.

Rumery admitted the conversation took place but asserted that the conversation was innocuous and that no threats were made. (Petition, App. A-3, B-3)[3]

However, the police report, n.2, *supra*, states that as a result of this second conversation Mary Deary was sobbing and hysterical. She reported that Rumery told her Champy's lawyer would nail her to the wall, and that "she and her daughter would end up like the two women in Brockton." The remark concerning "the two women in Brockton" was understood to refer to a then recent double shooting incident in which two women had been killed. (J.A. 31) The police report also indicates Mary Deary said Rumery boasted to her that "he had gotten Ron Silva [sic] off his rape case, and that he could do the same in this [Champy] case." Another of Rumery's hunting companions, Ron Silver, had either pleaded to, or had been convicted on a reduced charge in a previous and unrelated sexual assault case. (J.A. 31)

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[2] The police report is Ex. 1 to the deputy county attorney's deposition transcript, Def. Ex. C. The police report was admitted in evidence, not for the truth of Mary Deary's statements described therein, but as evidence of the information available to the officers at the time of Rumery's arrest for witness tampering. (J.A. 49)

[3] Rumery's version of the conversation, which is set forth in the Counter-Statement of the Case in Respondent's Brief in Opposition to the Petition for Certiorari, p. 2, was not admitted by the trial court for the truth of the matter.

After Rumery's first call to Mary Deary, the prosecutor in charge of the Champy case, Deputy County Attorney Brian Graf, became concerned about the effect of Rumery's statements on Mary Deary, who was both the victim and principal witness in the rape case. Graf and Newton Chief of Police David Barrett discussed Rumery's initial telephone call to Mrs. Deary. They also discussed the difficulty of obtaining corroborating evidence of witness tampering. (J.A. 48-49) Graf and Chief Barrett talked about getting authorization for a wiretap, but before this was done, the second telephone conversation occurred on May 11, 1983. (J.A. 50) Graf said Chief Barrett explained that "the situation had gotten out of control to such an extent . . . he felt he had to act." (J.A. 50)

Rumery was arrested and taken to the nearby Rockingham County jail where he was booked and then released on his personal recognizance. Within a week Rumery retained Stephen Woods, an experienced criminal attorney, to defend him. The trial court found that Woods was a very competent attorney with more than ordinary expertise in criminal law. (Petition, App. B-4)

Woods initiated contact with the prosecutor almost immediately. (J.A. 10) He told Deputy County Attorney Graf, "You had better *nol-pros* [sic] these charges, because we're going to win them and after that we're going to sue." (J.A. 11) Neither Graf nor Woods recalled specifically who first suggested a covenant not to sue in return for an agreement not to prosecute. (J.A. 11, 53) Woods testified, "after I had made this threat of a civil action the State was not willing to enter . . . a *nol-pros* [sic] *at that time* [prior to a probable cause hearing or grand jury indictment] without a release from Mr. Rumery of those threatened civil actions." (J.A. 20) (emphasis added) Woods understood this was in order to protect not only the police department but also the witness Mary Deary. (J.A. 20)

According to Woods, Rumery mentioned possible civil actions at their first meeting on or about May 18, 1983. Woods

"personally thought that too much of Mr. Rumery's attention was directed to the possibility of a civil action" (J.A. 12), and he had to calm his "excited" client (J.A. 22) in order to talk to him about the criminal matter. (J.A. 22) Woods himself drafted the covenant not to sue and arranged a face-to-face meeting with Rumery "to walk through the different possibilities." (J.A. 22)

Woods testified that he met with Rumery for one-half to one hour and discussed in detail the criminal justice system and, in less detail, potential civil actions which Rumery might have. (J.A. 12-13) He said he believed Rumery left his office with "a clear understanding of the different options that were open to him at that time." (J.A. 14) Rumery wanted to think about the matter further, and the covenant was not signed until about three days later, after Woods called Rumery to see if he had decided what course he wished to pursue. (J.A. 15)

Woods said he did not pressure Rumery to sign the covenant not to sue, except insofar as he gave his professional advice that it was in his client's best interest. (J.A. 14) Woods also stated that the prosecutor never exerted any pressure to have the covenant executed. On this point Woods testified:

> I don't think at any time Mr. Graf indicated that if Mr. Rumery didn't sign the release that they were going to have a probable cause hearing, an indictment, and proceed to trial. He just indicated that the criminal process would continue.
>
> . . . I mean, there was no indication that. . . Mr. Graf was therefore going to, you know, push this as far and as hard as he could. (J.A. 19)

The trial court found that no pressure was exerted by the prosecutor to have the covenant signed. (Petition, App. B-2)

Although Rumery denied conferring in person with Woods at his office about the covenant not to sue, the trial court found to the contrary. (Petition, App. B-2) Rumery conceded

that he took time to think about signing the covenant, and he read it before signing. (J.A. 40) While Rumery claimed he only partially understood the document, the trial court discounted this testimony. (Petition, App. B-4)

At the time the covenant not to sue was executed, June 6, 1983, Deputy County Attorney Graf believed there had been probable cause for the arrest and that there were grounds for seeking a grand jury indictment on the witness tampering charge if the victim, Mary Deary, was telling the truth. (J.A. 49)

As of June 6, 1983, Graf had "considerable concern about Mary Deary because the David Champy case was still pending" (J.A. 52), and he had learned by then of her reluctance to testify against Rumery, "that *she felt she had gone through enough.*" (J.A. 52) (emphasis added) Graf testified he "was taking into consideration the fact that [he] had her as a victim of one case [alleged aggravated felonious sexual assault],[4] and now, the State was in a position of perhaps having to force her to testify against her will [,] perhaps causing more trauma . . ." in the witness tampering case. (J.A. 52)

Graf viewed the covenant not to sue as "a possible common sense resolution of the problem [which] was up to Mr. Rumery as to whether or not he wanted to accept this resolution." (J.A. 53) Graf never met with or talked to Rumery. (J.A. 53) Graf said if Rumery had not signed the covenant:

> I don't know if we would have forced Mary Deary to testify through a grand jury subpoena if necessary because I didn't have to make that decision. But it was a possibility that certainly existed. (J.A. 54)

The prosecutor understood the proposed resolution to be "that the State would agree not to prosecute Mr. Rumery, and in exchange Mr. Rumery would agree that he would not sue

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[4] David Champy eventually pleaded guilty to a lesser included offense in the underlying sexual assault case.

anybody with respect to the case, and the matter would be put to rest for all parties." (J.A. 52) When Graf received the executed covenant not to sue from Woods, "the file that had been prepared for probable presentment to the grand jury was simply marked not presented and put in [the] closed file." (J.A. 53) The probable cause hearing which had been scheduled for June 14, 1983 was not held.

The State honored the agreement.

Ten months later, Rumery, having acquired new counsel, filed a six-count civil rights action against the Town of Newton, Police Chief Barrett, and the Town Selectmen. The complaint alleged federal claims under § 1983 and pendent state law claims, arising from Rumery's arrest for witness tampering.[5]

The Trial Court's Findings

This case comes to the Court upon findings of fact by the United States District Court for the District of New Hampshire (Loughlin, J.).

The trial court dismissed Rumery's multiple count civil rights complaint, following an evidentiary hearing at which testimony was given by Rumery, his criminal defense attorney, the deputy county attorney and Mrs. Rumery.

After hearing the testimony and weighing all the evidence concerning the execution of the covenant not to sue, the trial court held that the covenant was valid, having been the product of Rumery's voluntary, deliberate and informed decision. In reaching this conclusion, Judge Loughlin specifically found that Mr. Rumery, while represented by competent and experienced legal counsel, "intelligently and carefully, after weighing all the factors, concluded, that it would be in his best interest and welfare" to sign a covenant not to sue in connection with this arrest for witness tampering, in return for which, the

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[5] The state law claims alleged negligence, defamation, false imprisonment, negligent infliction of emotional distress, and state constitutional violations.

deputy county attorney agreed not to prosecute. (Petition, App. B-4). Furthermore, the trial court found that the prosecutor had not coerced or pressured Rumery into signing the covenant. (Petition, App. B-2).

On appeal, the United States Court of Appeals for the First Circuit chose not to question the trial court's findings of fact, but instead reversed purely on grounds of federal public policy.

The Reversal by the Court of Appeals

The United States Court of Appeals for the First Circuit, considering this an issue of first impression, concluded that Rumery's covenant not to sue could not serve to bar his civil action because release-dismissal agreements have the unavoidable effect of injuring the public interest.[6] The Court explained:

> Since the object of a criminal prosecution is to vindicate the public, not a private individual, an agreement not to prosecute should be upheld only where the *public* interest is served. [footnote omitted] It is difficult to envision how release agreements, negotiated in exchange for a decision not to prosecute, serve the public interest. (Petition, App. A-6) (emphasis in original)

The Court went on to say:

> Enforcement of such covenants would tempt prosecutors to trump up charges in reaction to a defendant's civil rights claims, suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights. (Petition, App. A-6)

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[6] Although the First Circuit's decision speaks in terms of "releases" and Rumery's "covenant not to sue," petitioners believe the decision's reasoning invalidates all form of waivers obtained in return for the dismissal of criminal charges, including stipulations as to probable cause.

The Court also intimated "that a defendant forced to choose between filing a civil rights claim and being prosecuted on a criminal charge cannot make an uncoerced choice as a matter of law." (Petition, App. A-7)

In addition, the Court concluded that *any* exception to a blanket prohibition against release-dismissal agreements is likely to promote police or prosecutors' efforts to obtain such releases and "an exception cannot easily be shown important enough to outweigh its administrative burdens." (Petition, App. A-8) (emphasis added)

Thus, the United States Court of Appeals for the First Circuit adopted the ultimate prophylactic rule, holding that a covenant not to sue for alleged deprivations of constitutional rights, executed in exchange for a decision not to prosecute criminal charges, is void *ab initio*, regardless of the circumstances surrounding the initiation of charges or the execution of the release.

Summary of Argument

By adopting a *per se* prohibition against all release-dismissal agreements, precluding any consideration of the facts and circumstances of individual cases, the First Circuit has unjustifiably restricted the discretionary authority of prosecutors and defense counsel alike. This "void *ab initio*" proclamation is not only unsupported by public policy considerations, but serves, in fact, to thwart the public interest.

Release-dismissal agreements which are entered into voluntarily, deliberately and knowingly, serve to protect law enforcement personnel who, acting in good faith, attempt to diligently enforce the law. Furthermore, such agreements encourage broad-based citizen involvement and assistance in the administration of justice, by protecting victims and witnesses from threats of retaliatory litigation when the state terminates prosecution of the cases in which they are involved.

Properly obtained release-dismissal agreements also provide prosecutors with a valuable tool for achieving even-handed justice and a flexible and individualized application of the law. Where criminal defendants voluntarily, knowingly, and deliberately choose to forgo potential civil rights actions in return for the dismissal of supportable criminal charges, both the State and the criminal defendant achieve desirable goals in an expedient and equitable manner.

The assumption, implicit in the First Circuit's blanket prohibition, that public prosecutors cannot be trusted to act in the interest of justice, even when subject to review under the "voluntary, deliberate and informed" standard, is unjustified. The American criminal justice system has adopted, and this Court has consistently reaffirmed, a policy of permitting, and in fact encouraging, plea bargaining agreements. Under this system, the nation's prosecutors are faced daily with precisely the same pressures and temptations which the "void *ab initio*" rule finds unacceptable. Operating under a constitutional standard which requires that plea bargains be "voluntary and knowing," prosecutors routinely further society's interest in the expedient resolution of criminal matters, without impinging upon the constitutional rights of criminal defendants. Petitioners see no reason why prosecutors will be unable to show similar restraint and integrity in the use of release-dismissal agreements.

Although there is clearly a public interest in insuring that criminal defendants are not coerced into relinquishing their civil or constitutional rights, a blanket prohibition against release-dismissal agreements is overbroad. The difficult choice confronted by criminal defendants who must decide between preserving the possibility of bringing a civil rights action and facing the possibility of criminal conviction by a jury of their peers, although difficult, is not inherently coercive. This Court has held that criminal defendants may be forced to make the difficult decisions inherent in the plea bargaining system. The criminal and civil ramifications of decisions made

by criminal defendants in the plea bargaining process create a significantly greater threat of coercion than do their decisions concerning release-dismissal agreements. Our criminal justice system, which tolerates and encourages such choices in one situation, should not preclude them in the other.

Release-dismissal agreements, obtained in a voluntary, knowing and deliberate manner, serve to further the public interest in the efficient and just administration of criminal law and simultaneously protect law enforcement personnel, governmental entities and society at large from the burdensome costs of defending retaliatory civil rights claims. At the same time, such agreements provide criminal defendants with an opportunity to utilize the remedies created by 42 U.S.C. § 1983 to quickly obtain a desired termination of justified criminal prosecution.

Arguments

I. Public Policy Neither Compels Nor Supports a *Per Se* Prohibition Against All Release-Dismissal Agreements

In adopting its *per se* prohibition against release-dismissal agreements, the United States Court of Appeals for the First Circuit identified four separate public policy considerations which purportedly compel a blanket prohibition against such covenants:

(1) No public interest is served where a criminal prosecution is abandoned in exchange for a release of civil liability;

(2) The enforcement of release-dismissal agreements would encourage prosecutors to "trump up charges," thereby suppressing evidence of police misconduct and chilling the assertion of individuals' constitutional rights;

(3) A criminal defendant forced to choose between filing a civil rights claim and being prosecuted on a criminal

charge cannot, as a matter of law, make an uncoerced choice; and

(4) Exceptions to a *per se* prohibition against release-dismissal agreements would pose administrative problems.

Although each of these four policy considerations raises legitimate issues of public concern, they do not, either individually or together, justify the First Circuit's blanket prohibition against release-dismissal agreements.

(1) *Under Appropriate Circumstances, As in the Case at Bar, Release-Dismissal Agreements Serve the Public Interest.*

In the decision below, Circuit Judge Timbers lucidly articulated the requirement that contracts or agreements arising within the sphere of the criminal justice system are valid only where the public interest is served.

> The need to closely scrutinize contracts or agreements in the criminal law context is particularly important because of the special relationship between a criminal prosecution and the public interest. Courts ordinarily are reluctant to set aside a contract provision in an ordinary agreement, because, no matter how badly off one of the parties may be, the agreement is likely to benefit both parties in some way. But an agreement in the criminal law context is different. Since the object of a criminal prosecution is to vindicate the public, not a private individual, an agreement not to prosecute should be upheld only where the public interest is served. (Circuit Court Decision, Petition App. A-6)

While the above-quoted proposition is beyond reproach, the First Circuit erred in its application of this rule to release-dismissal agreements in general, and to Rumery's covenant not

to sue in specific. The First Circuit's narrow definition of "public interest" apparently fails to encompass release-dismissal agreements because the benefits of such covenants appear, upon first glance, to flow primarily to the individual complainants, police officers or prosecutors, as opposed to the government or to society at large. Such a restrictive view of the public interest, however, fails to account for a number of widely recognized public policies which such agreements frequently serve to advance.

a. *Release-Dismissal Agreements Serve The Public Interest By Protecting Law Enforcement Personnel And Encouraging Citizen Participation In The Criminal Justice System.*

Realistically, not all criminal charges which are supported by evidence can be prosecuted because of the limited resources available. There are simply not enough prosecutors, criminal defense lawyers, judges and jails to accommodate this nation's massive criminal caseload. Nor is prosecution necessarily desirable in every otherwise provable case. In a system which does not provide sufficient resources to prosecute every case which could be prosecuted, the civil consequences of the prosecutor's decision not to prosecute necessarily becomes a matter of public interest and concern.

The protection of local law enforcement officials and private complainants from civil lawsuits, arising from their involvement or assistance in the administration of the criminal justice system, is undeniably in the public interest.

The public interest in effective law enforcement, in attracting and motivating dedicated police personnel and in encouraging victims of crime to report offenses freely and to assist law enforcement officials, does not require elaboration. This public interest is embodied in indemnity statutes for law

enforcement officials,[7] in witness tampering statutes such as New Hampshire RSA 641:5 and in statutory and judicially created privileges and immunities for individuals who report suspected criminal activity to law enforcement authorities.[8]

Indeed the "good faith" immunity defense, available under 42 U.S.C. § 1983, demonstrates the degree of public interest in protecting officials who exercise discretion in the public's behalf. Those who act reasonably within the scope of their duties do not incur individual private liability. *See Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

Those supporting the First Circuit's blanket prohibition against release-dismissal agreements may argue that the above-enumerated privileges, immunities and defenses, which evidence the governmental and societal interest in protecting law enforcement personnel and complainants, provide sufficient protection to those individuals so as to eliminate or minimize the adverse effects of the Court of Appeal's "void *ab initio*" proclamation. This argument, however, ignores the harsh reality that individuals, governments and society frequently pay a high price in litigation, regardless of the merit of claims or the eventual outcome of the cases.

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[7] For example, *See* N.H. RSA ch. 29-A (Supp. 1985) (defense and indemnification of county officials and employees; county attorney to represent and defend); N.H. RSA ch. 31:106 (Supp. 1985) (defense and indemnification of municipal employees in civil rights suits); N.H. RSA ch. 99-D (Supp. 1985) (defense and indemnification of state officials and employees; state attorney general to represent and defend).

[8] "Public policy demands that police investigations should not be thwarted by inability to obtain answers from persons who know the facts but fear civil actions." *Hutchinson* v. *New England Telephone and Telegraph Company*, 350 Mass. 188, 214 N.E. 2d 57, 59 (1967); *Vogel* v. *Gruaz*, 110 U.S. 158 (1884); *McGranahan* v. *Dahar*, 119 N.H. 758, 769; 408 A.2d 121 (1979) (Citizen reports of criminal activity, even though they are false and malicious, may not serve as the basis for an action in defamation).

The policy of protecting witnesses from civil liability in order to encourage public assistance in criminal investigations is also documented by N.H. RSA ch. 169-C:31, which grants immunity to citizens who report their suspicions of child abuse.

The public interest is acutely affected by the cost of defending civil actions brought against local public officials and municipalities. Experience suggests that even where the "good faith" immunity defense will likely insure a favorable verdict, the burden of civil litigation often compels settlement at "cost of defense". Even in cases where no "cost of defense" or other settlement expenses are incurred, the government entity, either directly or indirectly through increased insurance costs or unavailability of insurance, bears the substantial costs of defending against meritless claims.

Apart from attorney's fees and the costs of discovery, the government entities and society in general suffer from the lost man-hours taken up by depositions, court appearances, etc. Furthermore, and most significantly, the effective administration of justice is hampered by the demoralizing effect such litigation has on dedicated and diligent law enforcement personnel.[9]

Explicitly recognizing these public policy considerations, this Court has stated:

> In the context of Butz's attempted balancing of competing values, it is now clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risk of trial—distraction of officials from their governmental duties, inhibition of discretionary

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[9] Ironically, the First Circuit recently articulated its concern that qualified individuals may be deterred from accepting public office by the emotional as well as monetary costs of defending against civil rights suits, regardless of their eventual outcome. "Even if the actual time spent on a case away from his ordinary responsibilities were the same whether the damages claim was in or out, *the official's energy may be diverted from pressing public issues merely by the personal apprehension involved*. At least, the official sued for damages may have to retain his own personal counsel at his own expense. *In this litigious age all these concerns are legitimate, and might easily deter individuals from taking public office.*" *De Abidia* v. *Hon. Luis Izquierodo Mora*, No. 85-1505/85-1520, slip opinion (1st Cir. may 27, 1986) (emphasis added).

> action, and deterrence of able people from public service. There are special costs to 'subjective' inquiries of this kind.

Harlow v. *Fitzgerald*, 457 U.S. at 816 (1982).

Municipalities can, and often are, in effect, held hostage by vindictive claimants regardless of the legal merits of their claims.

In this sense, the benefits of properly obtained release-dismissal agreements do not serve the private civil interests of police officers, witnesses, victims and prosecutors who, because of indemnity statutes and insurance, are rarely subject to personal liability. Rather, they serve to protect the municipal, county or state entities charged with enforcing the law, as well as to encourage active public participation in the criminal justice system.

b. *Release-Dismissal Agreements Serve The Public Interest By Facilitating The Just Resolution Of Criminal Prosecutions.*

In addition to furthering the public interest in protecting law enforcement officials and private complainants involved in the criminal justice system, properly obtained release-dismissal agreements serve the public interest by providing both prosecutors and defendants with an effective and practical vehicle for achieving a just resolution of certain cases.

The public prosecutor's primary obligation is to use the discretionary power entrusted to him in the furtherance of justice.[10] In our system of justice, prosecution is not regarded as desirable in every case which may be supported by evidence:

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[10] In this regard, prosecutors are occasionally reminded that their overriding obligation is to do justice, not necessarily to obtain convictions. *See Berger* v. *United States*, 295 U.S. 78, 88 (1934).

> The public interest is best served and even-handed justice best dispensed not by mechanical application of the 'letter of the law' but by a flexible and individualized application of its norms. . .

Standards Relating to the Prosecution Function, § 3.9 comment at 94 (American Bar Association) (Approved Draft 1971) (hereinafter "ABA Standards"); National Prosecution Standards, Standards 8.1-9.4 (National District Attorneys Association, 1977) (hereinafter "NDAA Standards").

> An accused should be screened out of the criminal justice system when the benefits to be derived from prosecution or diversion would be outweighed by the costs of such action.

Criminal Justice Standards and Goals, Courts Standard 1.1 (National Advisory Commission 1973).

Thus, the equal but flexible application of the law to individualized facts and circumstances is a fundamental goal of the American criminal justice system. Properly obtained release-dismissal agreements further this public policy by providing both prosecutors and defendants with an additional alternative for resolving cases.

The circumstances surrounding the case presently before the Court serve to highlight the desirability of having a release-dismissal option available to defendants and prosecutors. The prosecutor in this case considered the interests of all concerned and accepted the covenant not to sue as a just resolution of the criminal proceeding. Deputy County Attorney Graf believed that there was probable cause to indict Rumery if Mary Deary was telling the truth. (J.A. 49) He was therefore under no legal duty to dismiss the case. He also knew Mary Deary was reluctant to testify against Rumery, because, *"she felt she had been*

through enough." (J.A. 52) (emphasis added) Graf was faced with the prospect of persuading Mary Deary to testify against Rumery, or, if necessary, forcing her to testify by subpoena. The latter, he said, was "a possibility that certainly existed." (J.A. 54)

Graf was understandably concerned about Mary Deary's emotional vulnerability as the victim of an aggravated felonious sexual assault and about her willingness to testify as the State's principal witness in both the witness tampering case and the rape case. (J.A. 52) The trial court specifically noted that Graf took into consideration "the trauma if Mary Deary was forced to testify" against Rumery. (Petition, App. B-2)

The prosecutor's decision in this case to forego the witness tampering charge and pursue the sexual assault case was not only a reasonable exercise of discretion in the public interest. It was also a compassionate humane decision as to the victim, furthering the public interest in protecting the witness which is embodied in the witness tampering statute itself. Graf could have also reasonably concluded, under the circumstances, that it was not necessary for purposes of retribution, deterrence or rehabilitation to prosecute Rumery, and that it was appropriate to relieve him, a businessman with no prior criminal record, of the stigma of further prosecution.[11]

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[11] "This occurs not infrequently in shoplifting cases, disturbances involving husbands and wives and a myriad of other disturbance situations. Often, the arrest and temporary detention of a person pending posting of bail or the releasing of the individual on his own recognizance is sufficient to diffuse an otherwise volatile situation, to the end that further criminal prosecution is unnecessary and undesirable. Further prosecution in many cases would cause embarrassment in employment, unnecessary matrimonial hostility, or, as in the instant case, a possible thwarting of a future career. The reasons are multitudinous for a district attorney not to want to pursue the prosecution of a person arrested with probable cause for a minor public offense, in the best interest not only of society but of the individual involved." *Hoines* v. *Barney's Club, Inc.*, 28 Cal. 3d 603, 610, 620 P.2d 628, 633 n.7 (1980) (quoting dissenting opinion of Justice James B. Scott when case was before the Court of Appeal, First District, Division Three).

In deciding whether to prosecute, the prosecutor may properly consider the reluctance of the victim to testify, the nature of the offense, any undue hardship to the defendant, and various other mitigating factors. *See generally*, ABA Standards, NDAA Standards, *supra* at p. 17. Thus, the prosecutor in this case concluded on the basis of recognized public policy considerations that, while he was under no legal duty to dismiss the case, neither did justice require prosecution.

At the same time, however, Deputy County Attorney Graf knew that Rumery's lawyer was threatening civil action, and the decision to enter a *nolle prosequi* would leave the Town of Newton, Chief Barrett and Mary Deary exposed to the burden of civil litigation.

Mary Deary would be the critical witness in any action arising out of Rumery's arrest for witness tampering. Thus, given Rumery's prior activities, it was entirely possible that Rumery could use the threatened civil action as a means of further intimidating Mary Deary and the police in an attempt to influence the prosecution of Champy for Mary Deary's rape.

If Rumery was willing to forego any and all civil actions, in return for dismissal of the pending charge prior to a probable cause hearing or grand jury indictment, Graf concluded justice would best be served by entry of a *nolle prosequi*. The covenant not to sue was, in his own words, a "possible common sense resolution". (J.A.53)

Therefore, the availability of a "release-dismissal option" allowed the prosecutor sufficient discretion to arrive at a just resolution of the charges against Rumery while protecting a fragile but vital witness and maintaining the integrity of the more important sexual assault prosecution. Such a resolution could not have been achieved if the First Circuit's blanket prohibition against release-dismissal agreements were in effect at the time of the prosecution. Consequently, the availability of release-dismissal agreements furthers the public interest in encouraging the flexible and individualized application of the law.

c. *Release-Dismissal Agreements Serve The Public Interest By Providing Criminal Defendants With A Practical Tool For Asserting Their Constitutional Rights.*

Properly obtained release-dismissal agreements serve an important public purpose by providing an effective, inexpensive and accessible mechanism for enforcing individuals' constitutional rights pursuant to 42 U.S.C. § 1983. Although at first blush, the notion that a waiver of rights can serve as a mechanism for enforcing those rights appears oxymoronic, the release-dismissal agreement may well be a criminal defendant's most accessible and desirable means of asserting his constitutional rights.

Again, the specific facts of the case now before this Court underscore how release-dismissal agreements serve a public interest.

Rumery had been arrested for witness tampering. He faced possible indictment, conviction and imprisonment on those charges. Given the nature of the crime with which he was charged and the information which Mary Deary had provided to the police, it is apparent that Rumery's fate turned in large part upon whether the police, prosecutor, grand jury and petit jury believed his word over that of Ms. Deary.

As is often the case with criminal defendants, even those righteously professing their innocence, Rumery faced an uncertain future, dependent upon such intangible and unpredictable factors as how twelve strangers might weigh his credibility against that of an alleged rape victim. Rumery had no guarantees.

Faced with the uncertainty inherent in the criminal justice system, Rumery, through his attorney, took the offensive. "You had better nol pros (sic) these charges, because we're going to win them *and after that we're going to sue.*" (J.A. 11) (emphasis added) Thus, Rumery utilized his constitutional rights protected by 42 U.S.C. § 1983 to create leverage with

which he obtained a complete dismissal of the charges against him. As the trial court found, Mr. Rumery, while represented by competent and experienced legal counsel, "intelligently and carefully, after weighing all the factors, concluded that it would be in his best interest and welfare" to sign a covenant not to sue in connection with his arrest for witness tampering, in return for which the deputy county attorney agreed not to prosecute. (Petition App. B-4)

Had the First Circuit Court of Appeals adopted its blind prohibition against all release-dismissal agreements prior to Mr. Rumery's arrest, he would not have had the option of utilizing his rights protected by § 1983 to leverage a dismissal of the criminal charges against him. His future would have lain solely in the hands of the prosecuting attorney. The charges may have eventually been dropped due to considerations concerning the primary witness. On the other hand, it is just as possible that Ms. Deary would have either testified voluntarily or under subpoena, possibly resulting in Rumery's indictment, conviction and incarceration. Mr. Rumery chose to avoid that unpleasant possibility.

The rights protected by 42 U.S.C. § 1983, like any rights, are valuable only where the law permits the exchange of those rights for some form of desired consideration. Release-dismissal agreements provide criminal defendants with an option. They can preserve their rights under § 1983, take their chances at trial, and if successful, seek monetary compensation in the civil courts, or they can utilize those rights in the criminal forum in an attempt to obtain a dismissal of charges against them. In many situations, such as in the case at bar, the release-dismissal agreement is the most attractive alternative.

So long as the agreements are voluntary, deliberate and informed, they provide an inexpensive, accessible and effective means of utilizing and enforcing the constitutional rights protected by § 1983. They are a valuable tool which will be lost if the First Circuit's *per se* prohibition is affirmed.

(2) *The Danger Of Prosecutorial Misconduct Does Not Justify A* Per Se *Prohibition Against Release-Dismissal Agreements.*

The second public policy objection to release-dismissal agreements raises a legitimate issue of concern regarding the potential for prosecutorial misuse and abuse of such covenants. This concern, however, is insufficient to warrant a "void *ab initio*" rule, which precludes consideration of any of the facts and circumstances surrounding individual cases.

In support of its *per se* rule of prohibition, the Court of Appeals relied principally on three decisions from other circuits in which the Court of Appeals found evidence of improper prosecutorial motives: *Dixon* v. *District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968); *MacDonald* v. *Musick*, 425 F.2d 373 (9th Cir. 1970); *Boyd* v. *Adams*, 513 F.2d 83 (7th Cir. 1975).

In the seminal case *Dixon*, a black retired police detective sergeant was stopped by two white police officers for alleged traffic violations but was neither charged nor ticketed at the time. After filing a written complaint about the officers' conduct, Dixon apparently agreed not to proceed with his complaint and the government agreed not to bring traffic charges. Dixon filed a subsequent complaint and was then charged with two traffic offenses: failing to obey instructions given by a police officer, and obstructing the orderly flow of traffic. The prosecutor admitted he only filed the traffic charges because Dixon reneged on his agreement.

The Court of Appeals for the District of Columbia Circuit (Chief Judge Bazelon) characterized the prosecutor's action as a "gross abuse of discretion" and stated:

> We must therefore bar prosecutions which are brought because the defendant refused to promise or reneged on a promise not to file a complaint against the police. *Dixon*, 394 F.2d at 968-69.

In *MacDonald*, the defendant was arrested for driving under the influence of alcohol. He pleaded not guilty and demanded a jury trial. On the day of trial the prosecutor moved to dismiss the charge, but MacDonald refused to stipulate to probable cause. The prosecutor withdrew the motion and revived a charge of resisting arrest, which had been dropped, but on which he knew conviction was likely and, in fact, did occur. MacDonald was, however, acquitted on the original drunk driving charge.

The *MacDonald* record revealed that six deputy prosecutors in the district attorney's office indicated "either displeasure with the case or that it was a weak case or that they would not care to prosecute it" and it was further stipulated that one deputy prosecutor believed the police department was out to get MacDonald. The prosecutor himself stated, in effect, that he revived the resisting arrest charge in order to obtain a conviction because he feared MacDonald intended to sue the police department. *MacDonald*, 425 F.2d at 375.

The Court of Appeals for the Ninth Circuit deemed the prosecutor's tactics to be extortion and called the revival of the resisting arrest charge "the bludgeon behind the attempt" to hamper MacDonald in asserting his civil rights. *Id.* at 377.

In the *Boyd* case, the car in which Ms. Boyd was riding was stopped and searched by police officers, who searched its three male occupants and found nothing incriminating. Ms. Boyd refused to be searched, whereupon allegedly the police officers pushed her violently against the car, used abusive language, threatened her, arrested her, held her at the police station for five hours, and charged her with disorderly conduct and resisting a police officer. The release form in question was not presented to Ms. Boyd until some four months after her arrest when she appeared for trial on the criminal charges brought by one of the policemen. The prosecutor then offered to dismiss the charges on condition that she release the police officers and the City of Chicago from any and all claims arising out of her arrest.

The Court of Appeals for the Seventh Circuit said that the release was secured in such an inherently coercive context that it did not constitute an effective waiver of federal rights. The Court went on to find the release void as against public policy, relying, as did the Court of Appeals in the instant case, on the *Dixon* and *MacDonald* decisions, inferring from the circumstances that the primary purpose of the proffered release was to suppress evidence of police misconduct.[12]

The facts in the *Dixon*, *MacDonald* and *Boyd* cases give rise to their holdings, as the Court of Appeals for the Fourth Circuit pointed out in *Bushnell* v. *Rossetti*, 750 F.2d 298, 300 (4th Cir. 1984). In *Dixon* and *MacDonald*, the prosecutors had reason to suspect police misconduct yet they brought charges of dubious merit *after* the criminal defendants asserted themselves. Similarly, in *Boyd*, although the prosecutor did not bring the charges in reaction to the civil complaint, the circumstances there supported the Court's conclusion that the release was obtained under duress. The Courts in *Dixon*, *MacDonald* and *Boyd* fairly concluded that the prosecutors were not trying to do justice, but were instead attempting to punish or forestall assertion of civil claims.[13]

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[12] The *Boyd* Court also noted that the release would be of doubtful validity under state law, referring to the universal rule, followed in Illinois, that compounding a crime being itself criminal, an agreement not to prosecute is void, not only because it is against the policy of the law, but also because the agreement itself is a crime. *Boyd*, 513 F.2d at 87 n.5.

But see Hoines v. *Barney's Club, Inc.*, 28 Cal.3d 603, 610, 620 P.2d 628, 633 (1980) ("On no occasion has a prosecutor—motivated by what he reasonably deemed to be in the interests of justice—been held to have compounded a crime by promising to dismiss a charge in consideration of an accused's release of civil liability or stipulation of probable cause.")

[13] *Cf. Chaffin* v. *Stynchcombe*, 412 U.S. 17, 32 n.20 (1973) in which this Court held that the Due Process Clause did not bar a jury from rendering a higher sentence on retrial following a criminal defendant's successful appeal of a prior conviction but noted that if the only objective of a State practice is to discourage the assertion of constitutional right, it is "patently unconstitutional".

This suggests that the threat of a more severe criminal punishment is impermissible only where the *sole* basis for the higher sentence is the states' desire to discourage the assertion of constitutional rights.

Consequently, in each of these cases, the releases would have been invalid under the voluntary, deliberate and knowing standard applied by the trial court in the case at bar. Their facts and reasoning do not support a "void *ab initio*" policy, but rather, highlight the protection which a case-by-case application of the voluntary, deliberate and knowing standard affords.

Pointing to these cases of prosecutorial misconduct, the First Circuit concluded that a blanket prohibition against release-dismissal agreements was necessary to protect the public from the inherent danger such covenants presented.

> Enforcement of such covenants would tempt prosecutors to trump up charges in reaction to defendant's civil rights claim, suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights. We agree with those courts which have found such releases have the effect of injuring the public interest. (Petition, App. A-6)

Petitioners do not deny that release-dismissal agreements can be misused. But, as demonstrated above, they can also serve justice in appropriate situations and can preserve the limited resources of the criminal and civil justice system at the same time. They can benefit the criminal defendant and the victim, as the agreement did in this case.

Furthermore, the individuals' civil and constitutional rights implicated by such covenants are protected by the "voluntary, deliberate and informed" standard applied by the trial court below. Public policy concerns are met if the charge is supported by evidence and the primary purpose of the prosecutor is not to cover up police misconduct, but to serve an identifiable public interest, as in this case. The realistic likelihood of misuse is not so great as the Court of Appeals assumes.

a. *The Potential Risks of Release-Dismissal Agreements Parallel Those Presented by Plea Bargaining, Which is Subject to a "Voluntary and Informed" Standard.*

In examining public policy considerations bearing on release-dismissal transactions, one's attention is inevitably drawn to analogous policy considerations bearing on plea bargaining transactions.

> In each transaction, an accused is confronted with a criminal charge, circumstances exist which—in the State's view—do not require seeking imposition of the full penalty of the law, the accused does not wish to assert his innocence of wrongdoing so as to hazard a more severe penalty should he not prevail at trial, and the State's interest would be not served by a time consuming trial.

Hoines v. *Barney's Club, Inc.*, 28 Cal.3d 603, 620 P.2d 628 (1980).

As the Supreme Court of California cogently stated in *Hoines*, the "net effects" of a properly obtained release-dismissal agreement and a properly conducted plea bargaining transaction are identical: to terminate a pending prosecution while imposing upon the criminal defendant some "lesser disability than he might otherwise anticipate." *Id.* at 612-13, 620 P.2d at 634.

> In the plea bargaining transaction, the accused is subjected to a known but lesser criminal sanction which he has elected to accept under the circumstances. In a release-dismissal transaction, the accused escapes criminal sanctions altogether but is subjected to a civil disability which he has elected to accept under the circumstances. In neither case is there any compulsion preventing the accused from standing his ground and asserting his right to be free from all disabilities, both criminal and civil.
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> . . . .

> By requiring a release from the accused—but only by his free and voluntary election—the State accomplishes both the imposition of the bargained for disability and protection of those it reasonably deems to be innocently involved. This, however, is not a significant departure from what is achieved in a plea bargaining transaction.

Id.

The constitutional rights implicated in the plea bargaining situation are no less important than the First Amendment right to petition for redress of grievances which is implicated in the release-dismissal context. There is no difference of constitutional significance to the individual. *See Bordenkircher* v. *Hayes*, 434 U.S. 357, 365 (1978) (prosecutor's conduct, which merely presented defendant with alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution, did not violate Due Process Clause).

Thus, the essential elements of a plea bargain agreement and a release-dismissal agreement are the same. The plea bargaining process presents an equally dangerous opportunity for prosecutorial misconduct. If, as the First Circuit believes, release-dismissal agreements would tempt prosecutors to trump up charges in reaction to a defendant's civil rights claim, suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights, then, most assuredly, plea bargaining invites the same misuse.

It is important to note at this juncture that the practical effect of a plea bargain has civil ramifications which go far beyond the mere disposition of criminal prosecutions. Where a criminal defendant enters into a plea bargaining agreement which includes a plea of guilty to a lesser included offense, the criminal defendant will be barred from pursuing a subsequent civil action under 42 U.S.C. § 1983 or state common law grounds arising from claims of false arrest and malicious

prosecution.[14] Having entered a guilty plea, the defendant is precluded from asserting an essential element to a cause of action for malicious prosecution; i.e. that the criminal matter was terminated in a manner favorable to the civil plaintiff.

Thus, plea bargaining agreements present at least as severe a threat of prosecutorial misconduct as do release-dismissal agreements. The primary difference being that in a release-dismissal transaction, the criminal defendant walks away from the agreement free and clear from any criminal charges or penalties, while in the plea bargaining situation, the criminal defendant waives the right to pursue subsequent civil action and at the same time incurs some form of criminal penalty. As the court stated in *Hoines*, "we are unable to discern any policy ground for distinguishing between a properly conducted plea bargaining transaction and a properly conducted release-dismissal transaction. If one is deemed to serve the public policy, then the other must also." 28 Cal.3d at 612-13, 620 P.2d at 634.

The validity of properly conducted plea bargaining transactions is beyond question. This Court has consistently reaffirmed its determination that the potential dangers of prosecutorial misconduct inherent in a system which permits plea bargaining are not so great as to require a *per se* prohibition against such agreements.

Rejecting policy arguments similar to those presented by the First Circuit in its decision below, this Court, in *Corbitt* v. *New Jersey*, 439 U.S. 212 (1978), upheld the validity of a statute which presented a threat of more severe penalties for those criminal defendants who opted to assert their constitutional right to a jury trial.

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[14] "(I)t is well settled that a plea of guilty is an effective bar to a subsequent § 1983 action based on a claim of false arrest and false imprisonment." *See, e.g., Griffen* v. *City of Mount Vernon*, 553 F. Supp. 1047, 1049 (S.D.N.Y. 1983).

> While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect upon the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas. . .
>
> . . . .
>
> It follows that by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

Corbitt v. *New Jersey*, 439 U.S. at 220-22 (quoting *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 31 (1973).

Consequently, there is no doubt that the government may allow, and in fact encourage, criminal defendants to forgo their constitutionally protected right to a jury trial, and thereby waive certain rights to civil actions pursuant to 42 U.S.C. § 1983, under appropriate circumstances. Although such a system inevitably produces some threat of prosecutorial misconduct, the "voluntary, deliberate and informed" standard sufficiently protects the individual defendant and allows for the efficient administration of justice.

b. *The Case At Bar Illustrates The Impropriety Of The Per Se Prohibition.*

The specific facts and circumstances surrounding the case before the Court today vividly demonstrate that the First Circuit's "void *ab initio*" rule is incompatible with accepted public policy.

Deputy County Attorney Graf could have offered to abandon the witness tampering charges against Rumery in return for a guilty plea on a lesser offense. Assuming that the prosecu-

tor could identify a lesser included offense to a charge of witness tampering, and assuming that Rumery and his attorney were agreeable to a bargain, there is no question but that a plea bargain agreement would be permissible. If in fact such an agreement had been reached, Rumery would have incurred the criminal penalty attached to his lesser included offense. He would also have waived his rights under 42 U.S.C. § 1983 and state common law to bring a subsequent action for false arrest and malicious prosecution.

Under this hypothetical, the prosecutor would have been presented with precisely the same temptations to "trump up charges" as presented by the release-dismissal scenario. Furthermore, the validity of the guilty plea would be judged according to a standard of "voluntary and knowing" acceptance of the plea bargaining agreement. In this case, the trial court specifically found that Rumery's covenant not to sue was voluntary, deliberate and informed.

Consequently, the adoption of a *per se* prohibition against release-dismissal agreements would perpetuate an ironic and counterproductive situation in which prosecutorial conduct is judged by a "voluntary and knowing" standard when it involves the imposition of both criminal and civil disabilities, while simultaneously presenting a blanket prohibition against agreements which inflict only a civil disability, regardless of the circumstances surrounding the charges, or the voluntary, deliberate and informed nature of the agreement.

Such a contradictory system is unacceptable on its face, and will serve only to encourage the prosecution of cases which could otherwise be terminated in a manner agreeable to both prosecution and defense.

Petitioners do not mean to argue that official misconduct should be tolerated, but that society has other and more effective means of addressing this problem. As the plea bargaining/release-dismissal analogy underscores, the danger of prosecutorial misconduct inherent in these agreements is not so great as to warrant a *per se* prohibition against such covenants.

In a system which places a high priority on justice in individual cases, it should be permissible to enforce release-dismissal agreements which are given in a voluntary, deliberate and informed manner. The effect of the Court of Appeals decision in this case is to preclude the prosecutor from ever accepting an agreement, no matter how desirous the criminal defendant nor how compelling the circumstances. He can, of course, achieve similar results, so long as he forces the criminal defendant to incur a criminal penalty along with his waiver of civil rights claims.[15]

(3) *Under Appropriate Circumstances, As In The Case At Bar, Criminal Defendants May Make An Uncoerced Choice Between Filing Civil Rights Claims And Being Prosecuted On A Criminal Charge.*

The third public policy objection to any use of the release-dismissal agreements is based upon the supposition that, as a matter of law, criminal defendants forced to choose between asserting their civil rights and avoiding criminal prosecution, cannot make an uncoerced decision. This argument need not long occupy the Court as it flies in the face of accepted constitutional standards.

Again, the parallel between the release-dismissal agreements and plea bargaining transactions is inescapable. If a criminal defendant can, under appropriate circumstances, make an uncoerced choice between facing criminal charges which might result in the imposition of the death penalty or

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[15] A plaintiff-oriented civil rights litigation handbook prepared under the auspices of the National Lawyers Guild ends its discussions of release-dismissal agreements on this note: "We do not mean to suggest that a 'deal' should not be considered. In some cases, dismissal of criminal charges may be just what your client wants, irrespective of the fact that a civil suit will be foreclosed. *In this sensitive area, each case should be considered on its own merits.*"

Avery and Rudovsky, *Police Misconduct Law and Litigation* § 8.2(a) at 8-8 (2d Ed. 1986) (emphasis added).

instead waive his constitutional rights to a trial by submitting a plea of guilty to a lesser offense which carries a lesser penalty, how can the criminal defendant's choice between facing prosecution or relinquishing rights to a civil action be coercive, as a matter of law? The answer is self-evident.

In both situations, the danger of coercion exists. The existence of this inherent danger demands that such agreements be subject to a review which determines the voluntary, deliberate and informed nature of the criminal defendant's decision. There is, however, simply no rationale for applying a "voluntary and informed" standard to plea bargain while instituting a blanket prohibition against release-dismissal agreements.

As this Court has decided in plea bargaining cases, requiring a criminal defendant to make difficult choices concerning the rights he chooses to assert is not *per se* coercive.

> The criminal process, like the rest of the legal system is replete with situations requiring 'the making of difficult judgments' as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the constitution does not by that token always forbid requiring him to choose.

Corbitt v. *New Jersey*, 439 U.S. at 218 n.8 (citations omitted).

Again, petitioners do not argue that release-dismissal agreements pose no danger of coercion. It is undeniable that a criminal defendant faced with a choice between criminal prosecution or abandoning potential civil rights claims will feel the pressure generated by the potential for conviction and the penalties which follow. The voluntary, deliberate and informed standard, however, provides sufficient protection to such defendants while providing them with an alternative which the *per se* rule would preclude.

(4) *The Administrative Economies Of A* Per Se *Prohibition Against Release-Dismissal Agreements Are Insufficient To Justify Such a Draconian Measure.*

While conceding that under some circumstances a release of civil rights claims in exchange for the termination of a criminal prosecution may be warranted, the First Circuit noted that any exception to their *per se* prohibition against such releases would "pose administrative problems." (Petition App. A-8) In support of this contention, the First Circuit stated that the judicial inquiry into whether the release was indeed made free of coercion would create administrative burdens outweighing any advantage which such releases might provide. This position ignores the practical reality of how such claims reach the courts.

Opponents of release-dismissal agreements argue that releases are unnecessary in those cases in which they are merited. In other words, where the criminal defendant voluntarily waives his civil rights claims and the prosecution acted reasonably, it is likely that the prosecutor will prevail in a subsequent civil rights action. While there is some merit to this contention, it runs contrary to the claim that a *per se* prohibition decreases the administrative burdens on the court system.

Where a voluntary, deliberate and informed release-dismissal agreement has been executed, as in the case at bar, the release serves to terminate the subsequent civil rights action at an early stage. In Rumery's case, the judicial system was taxed only by a relatively light burden of holding an evidentiary hearing, which conclusively determined that the covenant not to sue was a valid and enforceable bar to the plaintiff's claim. Obviously, where the evidentiary hearing results in a finding that the release-dismissal agreement is valid, the release serves to promote judicial economy by ending the litigation.

If the release was void *"ab initio"*, the civil parties would have borne the expenses and burdens of discovery, summary motions, etc. Because the "good faith" immunity defense often turns upon a factual determination of the defendant's motives and the propriety of his actions, and because trial courts, despite the *Harlow* decision, have been reluctant to grant summary judgment, such civil rights cases, regardless of their merits, are seldom dismissed at an early stage.

Admittedly, where a release-dismissal agreement is raised as a defense to a civil rights action, and that agreement is found to be invalid for failure to meet the voluntary, deliberate and informed standard, the litigation will continue and the administrative burden of the original evidentiary hearing will have been to no avail. However, the additional burden involved in such cases is far outweighed by the judicial economy achieved in those cases in which the release is held valid and the litigation is terminated at an early stage.

In addition, it is apparent, given the paucity of district and circuit court cases involving release-dismissal agreements, that the courts have not, and will not, be overwhelmed by a flood of litigation concerning the validity of such covenants. Given that the use of release-dismissal agreements is apparently a wide-spread practice,[16] and in light of the small num-

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[16] "Municipal court judges for many years have been accustomed to dismissing minor misdemeanor cases on motion of the district attorney upon assurance that law enforcement officers, public agencies or private parties will not be subjected to civil litigation by the criminal defendant. This occurs not infrequently in shoplifting cases, disturbances involving husbands and wives and a myriad of other disturbance situations. Often, the arrest and temporary detention of a person pending posting of bail or the releasing of the individual on his own recognizance is sufficient to diffuse an otherwise volatile situation, to the end that further criminal prosecution is unnecessary and undesirable. Further prosecution in many cases would cause embarrassment in employment, unnecessary matrimonial hostility, or, as in the instant case, a possible thwarting of a future career. The reasons are multitudinous for the district attorney not to want to pursue the prosecution of a person arrested with probable cause for a minor public offense, in the best interest

ber of cases involving these covenants which have reached courts of record, it would appear that most criminal defendants who enter into release-dismissal agreements are satisfied with the results obtained. It may also be that most individuals who voluntarily enter into release-dismissal agreements, unlike Rumery, stand by their agreements.

Whatever the cause, disputes concerning the validity of release-dismissal agreements have not been an overly taxing burden on the administration of justice. The *per se* prohibition against covenants not to sue and releases exchanged in return for a dismissal of criminal prosecution is not justified by the potential for administrative economy.

II. Release-Dismissal Agreements Given Voluntarily, Knowingly And Deliberately Are Valid And Enforceable.

Having dispensed with the First Circuit's blanket prohibition against release-dismissal agreements, the Court may now turn to address the specific criteria for enforcing such covenants.

In the case at bar, the trial court determined the validity of Rumery's covenant not to sue based upon a standard requiring that the civil defendant affirmatively established that the agreement was voluntary, deliberate and informed. (Petition App. B-6)

The trial court below applied the appropriate standard.

To a very great extent, the arguments advanced above in opposition to the First Circuit's *per se* prohibition against release-dismissal agreements are equally applicable to support the "voluntary, deliberate and informed" standard applied by

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not only of society but of the individual involved. At the same time, it is reasonable to seek to protect the arresting officer or complaining individual from the burden of civil litigation arising out of the incident." *Hoines* v. *Barney's Club, Inc.*, *supra*, note 11, at p. 18.

the trial court below. Petitioners, therefore, in the interest of brevity, will not restate those agruments here, but instead rely upon the reasoning set forth above.

In particular, the Court's attention is directed to the recurring analogy between properly obtained release-dismissal agreements and properly conducted plea bargaining transactions. This Court has repeatedly reaffirmed its position that plea bargaining agreements are valid, and in fact desirable, so long as they are "voluntary and knowing". Petitioners see no justification for applying a more stringent standard to release-dismissal agreements.

The "voluntary, deliberate and informed" standard applied by the trial court below serves to encourage the proper exercise of prosecutorial discretion while providing sufficient protection for the constitutional rights of individual criminal defendants.

Conclusion

The trial court below determined that Rumery's covenant not to sue was a valid bar to his civil action. In reaching this decision, the court applied a standard basically identical to that utilized in determining the validity of plea bargaining agreements. The trial court held that the Town of Newton had the burden of affirmatively establishing that Rumery's covenant not to sue was the product of a voluntary, knowing and deliberate decision. By placing the burden of affirmative proof on the prosecuting authority, the district court created a rebuttable presumption of prosecutorial misconduct and coercion which the petitioners met and overcame. This rebuttable presumption provided the respondent with the safeguard against governmental oppression which the Constitution requires.

The First Circuit, in adopting its myopic prohibition, created an *irrefutable* presumption of prosecutorial misconduct and coercion.

The "void *ab initio*" proclamation rests on the implicit assumption that the power of prosecution is so overwhelming and the rights guaranteed by the Constitution so fragile that no agreement involving their exchange can ever be truly voluntary, knowing and deliberate. This assumption disregards the protections afforded by competent defense counsel, prosecutorial ethics and the availability of judicial review.

In light of this Court's reasoning in determining the validity of plea bargain agreements, the irrefutable presumption of prosecutorial misconduct and coercion is neither compelled by the Constitution nor justified by public policy or practical experience.

Although the issues presented by the case at bar concern matters of significant, and indeed, constitutional import, warranting the considerable efforts of counsel for both petitioners and respondent, and worthy of the attention given by the courts below as well as this Court's grant of certiorari, the question which the Town of Newton, New Hampshire asks this Court to decide is straightforward:

Do we, as a nation, have sufficient faith in the integrity of the individuals whom we appoint to enforce our laws, to permit them, under appropriate circumstances and subject to judicial review, to enter into voluntary agreements which may significantly restrict the remedies available to criminal defendants for alleged violations of their constitutional rights? Or, is the power of prosecution so great, the temptation for corruption so irresistible, and the threat of coercion so pervasive, that society must prohibit all such agreements without regard to their merits in individual cases?

Petitioners respectfully request that this court reverse the judgment of the United States Court of Appeals for the First Circuit and reaffirm the judgment of the United States District Court for the District of New Hampshire.

Respectfully submitted,

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